

The Economic Recovery Act Contains Both Unprecedented Opportunities For Government Contractors And Unprecedented Reporting and Oversight Requirements¹

The American Recovery and Reinvestment Act of 2009 is good news for government contractors, as it provides massive amounts of funding for federal and state projects on an immediate basis. At the same time, the Act contains new reporting requirements and oversight authorities that are in addition to the ethics and compliance procedures already imposed by the Federal Acquisition Regulation (“FAR”).

The Scope of the Contracting Opportunities is Vast

The dollars amounts appropriated by the Act are staggering and the projects encompass virtually every facet of government contracting. For example, the Act provides the Department of Defense with nearly \$1.5 billion to improve, repair and modernize its building facilities, while the General Services Administration is receiving \$5.5 billion for its Federal Buildings Fund. There is money for environmental remediation and resource protection: \$600 million is being added to the Environmental Protection Agency’s Superfund and the Corps of Engineers is receiving \$2 billion for water-related environmental infrastructure. There are correspondingly large amounts for research and development. The Air Force, Army, Navy, and Department of Defense are each receiving \$75 million for research, development and testing. Renewable energy and energy efficiency also play a large role: The Act appropriates \$4.5 billion for development of the electric grid, and the General Services Administration is receiving \$400 million for procurement of energy efficient cars. These are but a few examples of the spending authorized by the legislation.

The spending is to be accomplished quickly. In most cases, the Act only makes the money available until September 30, 2010. Section 1602 of the bill requires agency recipients to “give preference” to projects that can be started and completed “expeditiously,” with a goal of using at least 50 percent the funds on projects that can be started within 120 days of enactment of the legislation.

The Range of the Compliance Requirements is Correspondingly Comprehensive

With this unprecedented spending comes unprecedented levels of reporting and oversight. Section 1610 of the Act provides that, unless authorized by another statute, all contracts entered into by the Federal Government using funds made available by the Act are subject to the Federal Acquisition Regulation, including the provisions governing ethics, compliance, training, and internal audit and self-reporting. Section 1554 states that “to the maximum extent possible,” contracts shall be fixed-price and awarded using competitive procedures. Any contracts that are not fixed-price and awarded competitively must be summarized and posted on the new Government website, recovery.com.

Importantly, the Act imposes new reporting obligations on government contractors. Under Section 1512, all contractors and grantees receiving funds directly from the Federal Government must file a quarterly report with their Federal contracting agency. The report must contain: (1) the total amount of recovery funds received by the contractor or grantee from the agency; (2) the amount of the money received that was expended or obligated by the contractor or grantee; (3) a detailed list of

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the projects or activities receiving the funds, which must include a description of the project or activity, an evaluation of its completion status, and an estimate of the number of jobs created and retained by the project or activity; and (4) detailed information on any subcontracts or subgrants awarded by the recipient. The information in the reports must be made public by the contracting agency.

The Oversight Authorities Are Similarly Significant

The legislation specifically provides that compliance with the new reporting requirements will be a condition of receiving funds under the Act. This statutory language is significant because it seems intended to place the information in the contractor reports within the definition of a statement made in support of a claim for payment against the Government, and thus subject to the False Claims Act. Under the Act, which has both a civil and criminal component, an entity that submits, or causes to be submitted, a false or fraudulent claim or statement in support of a claim for money to the Federal Government is liable for up to treble the damages caused by the false claim or statement, penalties for each false claim or statement, and the Government's costs of bringing suit. Significantly, the False Claims Act contains a private plaintiff's provision. Any person, called a "relator," can bring an action under the False Claims Act if they have knowledge of fraud being perpetrated against the Government and the specifics of the fraud have not otherwise been publicly disclosed. The relator files the suit under seal in the name of the Government. The Government then evaluates whether to join in the action, or whether to let the relator pursue the case on his or her own. If the suit is successful, the relator shares in the recovery whether or not the Government intervened in the case. Thus, an employee of an entity receiving Economic Recovery Act funds could file an action against his or her employer under the False Claims Act if they believed the recipient's report concerning use of the funds is false—and share in any recovery. In 2008, the United States Government recovered over one billion dollars in judgments and settlements involving relator cases under the False Claims Act.

The Act also adds significant new levels of Government oversight and investigatory authority. It provides \$84 million for the creation of a new Recovery Act Accountability and Transparency Board, which is provided the same powers – including subpoena power – as are the agency Inspector Generals. Moreover, the legislation expressly grants the new Board, the existing agency Inspectors General, and the General Accountability Office the authorization to examine the records of any contractor, subcontractor, grantee or subgrantee that pertain to and involve transactions relating to the contract or grant, and to interview "any officer or employee" of the contractor, subcontractor, grantee or subgrantee.